NO. 85-834 (3)

Supreme Court, U.S.
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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1985

H. G. NIXON, as Administrator of the Estate of Lillian T. Nixon, deceased,

Petitioner,

vs.

MARGARET HECKLER, Secretary, Department of Health and Human Services,

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF OF PETITIONER

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ADDITIONAL REGULATIONS CITED

If you do not give us the medical and other evidence that we need and request, we will have to make a decision based on information available in your case. We will not excuse you from giving us evidence because you have religious or personal reasons against medical examinations, tests, or treatment.

20 C.F.R. § 404.1516

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(a) Notice of the examination. If your medical sources cannot give us sufficient medical evidence about your impairment for us to determine whether you are disabled or blind, we may ask you to have one or more physical or mental examinations or tests. We will pay for these examinations. However, we will not pay for any medical examination arranged by

you or your representative without our advance approval. If we arrange for the examination or test, we will give you reasonable notice of the date, time, and place the examination or test will be given, and the name of the person who will do it. We will also give the examiner any necessary background information about your condition when your own physician will not be doing the examination or test.

(b) Reasons why we may need evidence. We may need more medical evidence--

(1) To obtain more detailed medical findings about your impairment(s);

(2) To obtain technical or specialized medical information; or

(3) To resolve conflicts or differences in medical findings or assessments in the evidence we already have.

20 C.F.R. § 404.1517

ARGUMENT

Petitioner seeks a writ of certiorari to determine that the District Court has jurisdiction in a suit for damages arising out of a denial of procedural due process by the Social Security. The Secretary has replied by denying that Petitioner's cause of action is viable and averring that it is both legally and factually without basis.

The brief on behalf of the Secretary makes two general arguments which deserve a reply: I) That the claim of Mr. Nixon is frivolous and insubstantial and II) that unconstitutional abuse of process by the Secretary is not subject to judicial review even when the plaintiff's injury does not relate to an actual award of damages.

I. The claim of Mr. Nixon is substantial.

The Secretary assigns four reasons for the alleged frivolity of Mr. Nixon's claim. Each reason is unsound.

First, the Secretary states that the denial was not based solely on the allegation that Mrs. Nixon failed to meet a doctor's appointment but also because of insufficient evidence. (Respondent's Brief p. 5).

It should first be noted that the suggestion that there was insufficient evidence of disability is ludicrous. The final Disability Determination Rationale reveals that the DDD had received two pieces of medical evidence before the January 8, 1982, notice to Mrs. Nixon (Mem. Exh. I):

1. A report of Dr. N. E. Perret dated September 10, 1981. Dr. Perret was

a consultant hired by the DDD who examined Mrs. Nixon and reported general arteriosclerosis, malnutrition associated with a probable gastric outlet obstruction, severe peripheral vascular insufficiency, severe arthritis, and a history of various operations. He concluded, "I firmly believe she is definitely totally and permanently disabled." (Mem. Exh. B).

2. The Whitfield Memorial Hospital record. The record showed that Mrs. Nixon was hospitalized between June 26, 1981 and July 21, 1981 and between September 26, 1981 and October 8, 1981.[1/] (Mem. Exh. C). Then she was admitted on complaints of abdominal pain and vomiting. The diagnosis was recurrent duodenal

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[1/] Ironically the termination notice of January 8, 1982 claimed that the medical evidence showed she was able to return to work on October 1, at which time Mrs. Nixon was residing in Whitfield Memorial Hospital.

ulcer with partial duodenal obstruction, dehydration, and malnutrition. The second hospitalization was based on a diagnosis of active peptic ulcer disease, Zollinger-Ellison Syndrome, acute sprained lumbar spine, moderately severe osteoarthritis of the back and knee, and chronic thrombophlebitis in her legs. Her regular doctor stated that she was totally and permanently disabled. (Mem. Exh. C).

Even if we accept on its face the assertion of insufficient evidence, the regulations make clear that insufficient evidence standing alone is not a basis of denial but rather a predicate for additional medical examination. § 404.1517. The claim is denied for insufficient evidence only when there is a willful refusal to submit evidence § 404.1516 or there is refusal without good cause to take

part in a consultative examination. § 404.1518.

Second, Mr. Nixon's claim is allegedly frivolous because Mrs. Nixon had been given ample warning that her benefits would be terminated. Respondent's Brief p. 5. Mr. Nixon agrees that his wife was warned that she would lose her benefits. Indeed the thrust of her dilemma was that she was told she would lose her benefits but was not told the true reason for her denial. The letter to which the Secretary alludes contains the same untrue statement as does the social security notice. On November 16, 1981, the examiner wrote:

> Although you indicated on the report you recently completed for us that you did not feel your condition had improved so that you are able to return to work, the other information and evidence in your case shows that you are able to work and have been since October, 1981. (emphasis added)

(Supp. Mem. Exh. 1).

When the Social Security finally disclosed the medical reports used in considering Mrs. Nixon's claim, no evidence showing her ability to work was forthcoming. Moreover, no document reveals that a lack of response to the November 16 letter was ever material to the decision. (Mem. Exh. I).

Third, the claim is deemed frivolous because Mrs. Nixon "requested reconsideration . . . additional evidence of her disability was submitted at the reconsideration stage, and benefits then were continued to the date of her death." (Respondent's Brief p. 6). To make the point is to misconceive the claim. The illegal misuse of the statutory and constitutional duties of the Social Security Administration creates the breach of a legal duty which must be remedied. The Court's following statement in Mathews v.

Eldridge, 424 U.S. 319, 331 (1976) is equally applicable here: "Eldridge has raised at least a colorable claim that because of his physical condition and dependency upon the disability benefits, an erroneous termination would damage him in a way not recompensable through retroactive payments." When six narcotic agents carried the innocent Mr. Bivens off to jail, they could not undo the wrong simply by unlocking the jail door and giving him a handshake. Neither could the Secretary erase the harm to Mrs. Nixon by advising her that she was dead and returning her "pennies."

The Secretary's fourth claim of frivolity is based on an assertion that Petitioner erroneously relies on the regulation which permits a claimant to provide a "good reason" for missing an examination. (Respondent's Brief p. 6-7).

The Secretary apparently argues that even if Mrs. Nixon had a good reason for failure to attend (e.g. illness, failure to receive timely notice, being furnished incorrect or incomplete information, or death or serious illness in the family) then her benefits were permanently forfeited.[2/] The Secretary, in making such an Orwellian interpretation, ignores the operative portion of Rule 404.1518: "If you are already receiving benefits and do not have a good reason for failing or refusing to take part in a consultative examination or test which we arranged

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[2/] Nowhere does the Record reflect that, as a matter of fact, the DDD ever notified Mrs. Nixon of the setting of the two appointments (if any such record of notification existed, we would think that the Secretary would certainly have inserted it in the record). The record does reflect that the DDD notified the two medical organizations which were appointed to make the examinations (Mem. Exh. D) but there is no record of any sort that the DDD remembered to notify Mrs. Nixon.

for you, we may determine that your disability or blindness has stopped because of your failure or refusal." The failure to have a good reason is thus a condition precedent for denying benefits on that ground, which suggests that the Social Security Administration has the burden of establishing that Mrs. Nixon did not have a good reason.

Furthermore, the actions of the Social Security Administration in this case demonstrate that they do not follow the course of conduct urged in the Secretary's Response to the Petition. After Mrs. Nixon died, her physician reported the death to the DDD and the field disability determination rationale states: "Her physician stated that she was unable to go to an examination due to weakness." The excuse was accepted. If the Secretary's position that good reason must be

given before the date of the appointment were correct, the late advice as to why she failed to attend would have been inadequate.

This case was interrupted in the District Court by the early refusal of the District Court to take jurisdiction of the case. The plaintiff was thus not allowed the opportunity to present medical and lay evidence of the anguish caused Mrs. Nixon, who, when struggling with various life threatening but not necessarily fatal diseases was notified that the Social Security had concluded that the "medical evidence showed" that she was physically able to return to work on a given date. The case is yet to be developed as to the impact on this desperate woman who was told that there was medical evidence to the effect that her claim of disability was without merit. She never

lived to know that a cruel joke had been played on her. No medical evidence ever showed that she was no longer disabled. Only a bureaucratic technicality was involved and she was being punished by the denial of her pension because she apparently did not rise up from her convalescent bed and go to Montgomery to see another doctor and another hospital to learn whether they might agree with the first consultant who found her to be totally disabled. Plaintiff has not yet had the opportunity to present the evidence of the medical causation of the events which led to her death.

II. The unconstitutional abuse of process is subject to judicial review.

The Secretary argues that it was decided in Heckler v. Ringer, 466 U.S. 602 (1984) ". . . that a constitutional challenge to the procedures utilized in

the adjudication of claims 'arises under' the Social Security Act for purposes of Section 405(h), even where the plaintiff does not seek an actual award of benefits." (Respondent's Brief p. 8). In effect, the Secretary is maintaining that she can violate the constitutional rights of Mrs. Nixon and preclude her estate from seeking judicial relief. The Secretary draws a misleading conclusion from the case. In Heckler v. Ringer, a necessary ancillary part of the Court's decision was the availability of an alternative administrative procedure culminated by access to the courts through Section 405(g) of the Social Security Act. See Heckler v. Ringer, supra at 608, n. 4. Such is not the case here.

The Secretary is silent with respect to any comprehensive scheme specifically designed to provide full compensation to Social Security beneficiaries who are

injured or damaged as a result of violation of due process. See Bush v. Lucas, 462 U.S. 367 (1983). That silence is compelled by the fact that there is no such procedure. Section 405(g) relates only to an administrative process beginning with an initial determination of benefits and reconsideration and appeal of the correctness of that determination. It does not in any way provide for redress of the consequences of abuse of the process by governmental officials.

The Secretary states that the "statutory procedures have been finely tuned by Congress to accomodate the interests of claimants" and that "[T]he existence of these elaborate procedures . . . . counsel strongly against judicial implication of a damages remedy in this setting." (Respondent's Brief p. 7). In other words the Secretary alleges that Mrs. Nixon did

not follow the "finely tuned" procedure set up by the Congress. Actually, it is the Social Security Administration which did not follow the proper procedure.

The Secretary made a curious man bite dog argument when she suggested that protection is required so that "federal officials are not harrassed." [Respondent's Brief p. 9, quoting Butz v. Economou, 438 U.S. 478, 507-508 (1978)]. Where is the procedure to protect Social Security beneficiaries who are harrassed by the cynical indifference of Social Security officials who deem the lifetime savings of a school teacher to be frivolous and treat her that way? It is not to be found within the confines of Section 405(g).

The Secretary warns of the potential consequences of private damage actions arising under an administrative program in which more than two million claims are

processed annually. (Respondent's Brief p. 7). The answer to that warning is not self-evident without knowing the extent to which the program complies with its legal and constitutional obligations. If the Secretary implies that conduct such as that which is involved here is common within the program, then many lawsuits can be anticipated. In such circumstances hopefully the Social Security program will set its house in order.[3/] If, on the other hand, it is common for the Social Security program to comply with the rules, then perhaps Mrs. Nixon's situation is an aberration, in which case

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[3/] It is hard to believe that a different rule would apply in the Bivens case on the ground that narcotic agents routinely and frequently break into homes of innocent people without warrant or probable cause and it would be a hardship on narcotic agents to compensate the innocent victims because it happens so often.

her husband's injuries would be compensated but there would be very little impact on the program.

III. This case is important.

The positions taken by the Secretary underline the over-extension of the authority of cases such as Ringer which has taken place in the lower courts. The government takes the position that the courts in effect do not have the jurisdiction to entertain actions testing the compliance by government officers with their statutory and constitutional duties. The decision in the court below reflects a confusion between exhaustion of remedies, which permits the agency to utilize its procedures before a case reaches the courts, and outright preclusion of judicial

review.[4/] By invoking exhaustion of remedies in a case where there is no other remedy, the court below has snuffed out judicial review of unconstitutional actions by a public official. This ruling invades the axiomatic premise stated by Chief Justice John Marshall:

> The judicial power of the United States is extended to all cases arising under the constitution.
>
> Could it be the intention of those who gave this power, to say that in using it the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises?
>
> This is too extravagant to be maintained.

Marbury v. Madison, 1 Cranch 137, 178-9 (1803)

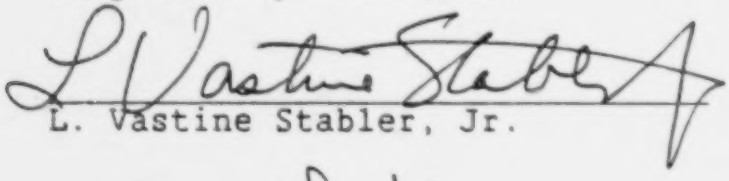
[4/] The Secretary suggests that the Eleventh Circuit might not have been ruling on the preclusion issue, because it issued an unpublished judgment. (Respondent's Brief p. 8 at n. 6). However, the District Court denied jurisdiction based on preclusion under § 405(h). The Eleventh Circuit affirmed. The District Court' order and the Magistrate's opinion remain unaltered.

We submit that review of this case will give the Court the opportunity to reaffirm the time-honored principles of judicial supremacy with respect to review of conduct which is to be measured by the Constitution of the United States.

CONCLUSION

Petitioner respectfully submits that the petition for a writ of certiorari be granted.

Respectfully submitted,



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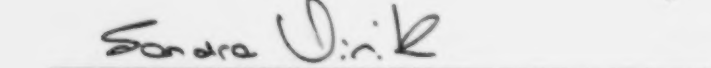

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